CHIN KON NAM & ANOR.

v.

CHAI YUN PHIN DEVELOPMENT SDN. BHD.

HIGH COURT SABAH & SARAWAK, KUCHING
DATO' HJ. ABDUL KADIR BIN SULAIMAN J
[SUIT NO. KG. 107 OF 1993/II]
22 NOVEMBER 1995

BANKRUPTCY: *Appeal against order of Deputy Registrar striking out 1st plaintiff's writ - 1st plaintiff undischarged bankrupt - Preliminary objection - Prior sanction of Official Assignee not obtained - Whether 1st plaintiff disabled from employing a lawyer to represent him in the appeal - Section 38(1)(a) Bankruptcy Act 1967 - Whether defendant prevented from raising objection at appeal stage - Subsequent rescission and annulment of receiving and adjudication orders pursuant to s. 36(2) of the Bankruptcy Act 1967 - Whether plaintiff can maintain the action.*

This was the 1st plaintiff's appeal against the decision of the learned Deputy Registrar striking out his writ of summons against the defendant on the grounds that the 1st plaintiff was an undischarged bankrupt and thus lacked the *locus standi* to commence or maintain the action as he had failed to obtain the prior sanction of the Official Assignee.

At the hearing of the appeal, the defendant raised a preliminary objection on a point of law contending that the 1st plaintiff could not employ an advocate and solicitor to represent him in the action without the prior sanction of the Official Assignee as s. 38(1)(a) of the Bankruptcy Act 1967 (the Act) applied to him. Counsel for the plaintiff objected to the raising of the preliminary objection at such a late stage and argued that s. 38(1)(a) of the Act had no application as; according to the marginal note, the section concerned consequences of refusal of discharge while in the present case the question of refusal or otherwise of discharge of the 1st plaintiff was not in issue. The plaintiff's Counsel submitted that by a Court order stated 9 January 1995, the receiving and adjudication orders made upon the 1st plaintiff were respectively rescinded and annulled and therefore the plaintiff could now maintain the action, his disqualificaiton being removed pursuant to s. 36(2) of the Act.

Held:

[1] The cause of action involved an allegation of breach of contract by the defendant and accrued before his bankruptcy and therefore the cause of action vested in the Official Assignee upon adjudication. Hence s. 38(1)(a) of the Act applies to him and unless the prior sanction of the Official Assignee is obtained to maintain his action, he is incompetent to do so in his own name. If he is so incompetent, he is also incompetent to employ an advocate and solicitor to act on his behalf without the sanction.

[2] The proceedings before the Court is by way of appeal from the decision of the learned Deputy Registrar pursuant to O. 56 of the Rules of the High Court 1980 (RHC) and it is by way of rehearing. The only limitation is as to the introduction of fresh evidence generally. However, this preliminary objection on point of law raised by the defendant is not considered as introduction of any fresh evidence. Being a point of law, it can be raised at any time in the course of any proceedings.

[3] The marginal note found printed at the side of sections in an Act, may sometimes be used but merely as an aid to construction. But they are not really part of the statute and they cannot restrict the wide and clear words of the section.

[4] Section 36(2) is related to the disqualifications referred to in subsection (1) and not generally. Thus the removal of the incapacity of the 1st plaintiff by the Court order of 9 January 1995 would not render competent the action of the 1st plaintiff commenced during the period of his incapacity and before the grant of the order by the Court without compliance with the provisions of s. 38(1)(a) of the Act. It follows therefore, that without the prior sanction of the Official Assignee during this period of incapacity, the 1st plaintiff is incompetent to engage an advocate and solicitor to represent him.

[Preliminary objection upheld. Appeal stood down to date to be fixed for plaintiff to obtain sanction from the Official Assignee. Costs thrown away to the defendant in any event].

Cases referred to:
Khoo Kim Hock [1994] 2 MLJ 29 ***(foll)***
Chandler v. PP [1964] AC 763 ***(refd)***
Britt v. Buckhamshire County Council [1964] 1 QB 77 ***(foll)***
Torkington v. Magee [1902] 2 KB 427 ***(refd)***
Ex parte Vine. In re Wilson [1887] 8 Ch. D. 364 ***(refd)***
Bailey v. Thurston & Co. Limited [1903] 1 KB 137 ***(dist)***
Beckham v. Drake 2 HLC 579 ***(refd)***
Ang Hoi Yin v. Sim Sie Hau [1969] 2 MLJ 3 ***(foll)***

Legislation referred to:
Bankruptcy Act 1967, ss. 18(1)(a), 24(4), 36(2), 38(1), (a), (2), 92(1), 105(1)
Rules of the High Court, O. 56

For the 1st plaintiff - Ernest Chua; M/s. Ernest Chua & Co.
For the defendant - Chong Siew Chiang (Grace Tan with him); M/s. Chong Brothers

JUDGMENT

Abdul Kadir Sulaiman J:

The 1st plaintiff appeals to the Judge in Chambers against the decision of the learned Deputy Registrar striking out his writ of summons issued against the defendant with costs. The learned Deputy Registrar made her decision which arose out of the defendant's summons in chambers filed on 15 October 1993 in encl. 12 on the grounds that the 1st plaintiff being an undischarged bankrupt has no *locus standi* to commence and/or maintain this action in his name as he has not obtained the prior sanction of the Official Assignee to do so. However, before hearing the appeal, the defendant raised a preliminary objection on a point of law. The learned Counsel for the defendant contends that the 1st plaintiff is disabled from employing an advocate and solicitor to represent him in the action unless a prior sanction of the Official Assignee to do so is first obtained. In this action the 1st plaintiff engages Mr. Ernest Chua of Ernest Chua & Company to represent him. This judgment is in relation to that preliminary objection raised.

The learned Counsel for the defendant cited the case of *Khoo Kim Hock* [1994] 2 MLJ 29 in support. In that case a Counsel brought an application under ss. 92(1) and 105(1) of the Bankruptcy Act 1967 on behalf of an undischarged bankrupt to have the adjudication order made against him annulled. When the application came up for hearing, Counsel for the Official

Assignee raised a preliminary objection on a point of law contending that having regard to the provisions of the Act an undischarged bankrupt in this country was disabled not only from maintaining the present application but also from employing an advocate and solicitor unless the prior sanction of the Official Assignee was first obtained. The learned Judge referred to s. 38(1) of the Act and held that the section does not apply to an application under ss. 92(1) and 105(1) where the applicant is seeking the Court's discretion to review, rescind or vary any order made by it, and as such no previous sanction of the Official Assignee is necessary. However, it was also held in the case that an undischarged bankrupt in this country is entitled to engage an advocate and solicitor to represent him in any action where the provision of s. 38(1)(a) does not apply, or where the cause of action does not vest in the Official Assignee. So, it is clear from the decision in that case that the issues of the employment of advocate and solicitor and the maintaining of any action by an undischarged bankrupt are inter-related. It is so because by s. 24(4) of the Act, when a debtor is adjudged bankrupt his property is vested in the Official Assignee. Therefore, anything to be done in relation to the property of a bankrupt generally must be with the sanction of the Official Assignee. It follows the above cited case also that an undischarged bankrupt is not entitled to employ an advocate and solicitor without the prior sanction of the Official Assignee in cases where s. 38(1)(a) of the Act applies to him.

Section 38(1)(a) of the Bankruptcy Act 1967 states:

> 38. (1) Where a bankrupt has not obtained his discharge:
>
> (a) the bankrupt shall be incompetent to maintain any action (other than an action for damages in respect of an injury to his person) without the previous sanction of the Official Assignee;

In our present case, the action by the 1st plaintiff involves an allegation of breach of contract by the defendant. It is not, therefore, an action in respect of an injury to his person.

Furthermore, from the pleadings the cause of action accrued before his bankruptcy and therefore the cause of action vested on the Official Assignee upon adjudication. Hence, s. 38(1)(a) of the Act applies to him. In the circumstances, unless the prior sanction of the Official Assignee is obtained to maintain his action, he is incompetent to do so in his own name, based on the above cited case, to which I concur. If so incompetent, he is also incompetent to employ an advocate and solicitor to act on his behalf without the sanction.

The learned Counsel for the 1st plaintiff objected on the ground that this preliminary objection of the defendant was raised at such a late stage. It ought to have been made when the matter was before the learned Deputy Registrar when hearing the application of the defendant at first instant. The matter before the Court today is in pursuance to notice of appeal over her decision given on 3 March 1994. I do not consider this to be a good ground because even though the proceedings before me now is by way of appeal from the decision of the learned Deputy Registrar, but being an appeal pursuant to O. 56 of the RHC, it is by way of rehearing. The only limitation is as to the introduction of fresh evidence generally. However, I would not consider this preliminary objection on point of law raised by the defendant as being one of introducing any fresh evidence. Being a point of law, it could be raised at any time in the course of any proceedings.

In his submission, the learned Counsel for the plaintiff informed the Court that apart from *Khoo Kim Hock*, *supra*, he cannot find any other local decision on the strict interpretation of the letter and spirit of s. 38(1) of the Bankruptcy Act 1967. He argues that s. 38(1)(a) of the Act has no application in this case because according to the marginal note the section

concerns consequences of refusal of discharge. Whilst in this case the question of refusal or otherwise of discharge of the 1st plaintiff is not in issue. I do not think I can agree. The marginal note found printed at the side of sections in an Act, may sometimes be used but merely as an aid to construction. But they are not really part of the statute. They cannot restrict the wide and clear words of the section: see *Chandler v. PP* [1964] AC 763. Sometimes a marginal note will in any case by inaccurate and as stated in *Britt v. Buckhamshire County Council* [1964] 1 QB 77, "on its own merits of no assistance whatever". In this case, the wordings of s. 38(1)(a) is clear that an undischarged bankrupt is incompetent to maintain any action otherwise than an action for damages for personal injury, except with the prior sanction of the Official Assignee. The 1st plaintiff's action here is in contract as opposed to that kind of tortuous liability. There is in fact in the affidavit in opposition of the plaintiff at para. 4 therein which states that prior to the giving of his consent in writing to him to commence and maintain this action, the Assistant Official Assignee, Kuching, Mr. Kho Fui Loong had verbally informed him to go ahead with the filing of the suit against the defendant as he needed time to communicate with the Official Assignee in Kuala Lumpur. However, without having to decide now whether that oral sanction would suffice, the issue before the Court now is in regard to the sanction to engage or employ an advocate and solicitor to represent him which is not covered by that oral sanction. There is therefore, no evidence that at least an oral sanction of the Official Assignee was ever obtained in regard to representation by advocate & solicitor in the action. Falling back on the dicta in *Kho Kim Hock, supra*, his case being one covered by s. 38(1)(a) of the Act, the plaintiff cannot be represented unless a prior sanction of the Official Assignee is obtained for that purpose. The learned Counsel cited *Torkington v. Magee* [1902] 2 KB 427, on the interpretation of a legal chose in action, and said that the right in the plaintiff to sue is not property. I see that the case cited has no relevance when dealing with the clear provisions of s. 38(1)(a) of the Bankruptcy Act 1967. In any event, the Act defines property to include things in action. He next cited *Ex parte Vine. In re Wilson* [1887] 8 Ch. D. 364 by saying that an undischarged bankrupt retains a right to sue if it arose subsequent to his bankruptcy. There is no doubt about that but to do so, he is controlled by s. 38 of the Act. But in this case the cause of action arose before his bankruptcy. So, again, I see no relevance in the case cited when dealing with the case before me now. Finally, the learned Counsel cited *Bailey v. Thurston & Co. Limited* [1903] 1 KB 137. According to the headnote, an undischarged bankrupt, employed as traveller for a firm under a contract made before the commencement of the bankruptcy, can maintain an action against the firm for a wrongful dismissal occurring after the commencement of the bankruptcy, the trustee in bankruptcy not having intervened in the action. In the action the defendant pleaded that the plaintiff was adjudicated bankrupt before the action was brought, and was an undischarged bankrupt when it was brought; and that the trustee was not a party to the action, and that, in consequence, the action was not maintainable. But the Court disagreed. This case can easily be distinguished on the facts because there the breach of contract occurred after the bankruptcy whereas in this present case the alleged breach occurred in 1985 well before the adjudication in 1990. At p. 141 Collins MR has this to say:

> In case of the breach of such a contract as existed in the present case, complete at the date of the bankruptcy, and sounding in a money claim, there is no doubt that the right of action would pass to the trustee, and that he would be the proper person to sue.,

which means that the damages obtained in the suit for breach which occurred before the bankruptcy would vest in the Official Assignee pursuant to s. 24(4) of the Bankruptcy Act 1967 and must therefore, be subject to s. 18(1)(a) of the Act.

The learned Master of the Rolls then cited a passage from the decision in *Beckham v. Drake* 2 HLC 579, which is as follows:

> I agree that a contract for the future work and labour of the bankrupt cannot be made by the assignees; they cannot hire him out (as was said by Lord Mansfield), adopt and enforce a contract made before the bankruptcy, for the application of the personal skill or labour of a bankrupt; but I do not think it thence follows that, where a contract to employ a trader has been broken before his bankruptcy, the assignees cannot sue upon that breach, it having been established that rights of action in general are vested in the assignees.

His Lordship then went on to state:

> There is also a passage from the opinion of Parke B. at p. 625 of the report to the same effect: 'The contract, if unexecuted, would clearly not have passed, to the assignees. But the question is, not whether the contract, but whether the right of action for the breach of it before the bankruptcy, passed.' It may be observed that the contract under consideration in that case was very similar to that in the present case, for there was an agreement to employ the appellant for a term of years at a salary; and the action was for breach of that contract by dismissing the appellant before the expiration of the term. That breach, however, occurred before the bankruptcy, and the House of Lords held that the right of action for that breach passed to the assignee.

Another interesting point brought out by the learned Counsel for the plaintiff in his submission is that now that by a Court order dated 9 January 1995 which was produced during the course of the submission, the receiving and adjudication orders made upon the 1st plaintiff in his bankruptcy was respectively rescinded and annulled, can he now maintain the present action, as his disqualification is now removed pursuant to s. 36(2) of the Act? In my opinion, it would not change the situation because the disqualification referred to in the section relates to the holding of certain offices which has nothing to do with the 1st plaintiff. Section 36(2) which concerns the removal of the disqualifications is related to the disqualifications referred to in subsection (1) and not generally. Though now the receiving order and the adjudication order made against him have been rescinded and annulled, but what concerns us in his incapacity at the time the action was commenced which this preliminary objection of the defendant is all about. In *Ang Hoi Yin v. Sim Sie Hau* [1969] 2 MLJ 3, the defendant was sued by the plaintiff in his capacity as an administratrix before the grant of the letters of administration was granted to her, though there was an order appointing her as such. It was held that as the plaintiff had not extracted the grant of letters of administration, she had no power to sue as administratrix and therefore the suit was a nullity and must be set aside. Lee Hun Hoe J (as he then was) citing *Ingall v. Moran* [1944] 1 KB 160, in delivering the judgment has this to say at p. 4:

> On 17 September 1942 the plaintiff in *Ingall v. Moran* issued a writ in an action brought by him under the Law Reform (Miscellaneous Provisions) Act 1934, claiming to sue in a representative capacity as administrator of his son's estate. But he did not take out letters of administration until nearly two months after the date of the writ. The County Court Judge applied the doctrine of "relation back" and found for plaintiff. Allowing the appeal, the Court of Appeal held unanimously that the action was incompetent at the date of its inception by the issue of the writ and, that the doctrine of the relation back of an administrator's title, on obtaining a grant of letters of administration to the date of the intestate's death could not be invoked so as to render the action competent.

Similarly, in this case, I would hold that the removal of the incapacity of the 1st plaintiff by the Court order of 9 January 1995 would not render competent the action of the 1st plaintiff commenced during the period of his incapacity and before the grant of the order by the Court, without compliance with the provisions of s. 38(1)(a) of the Bankruptcy Act 1967. It follows therefore, that without the prior sanction of the Official Assignee, during this period of incapacity, the 1st plaintiff is incompetent to engage an advocate and solicitor to represent him.

In the light of what has been said earlier, I find that there is merit in this preliminary objection of the defendant. I therefore, hold that owing to his incapacity when instituting this action against the defendant, having regard to the provisions of the Bankruptcy Act 1967, for his failure to obtain the prior sanction of the Official Assignee, in whom his cause of action was vested, the 1st plaintiff is not competent to employ an advocate and solicitor to represent him in the action. The preliminary objection of the defendant on this issue is upheld. Unless the sanction of the Official Assignee is first obtained by the 1st plaintiff to employ an advocate and solicitor to represent him, his present appeal against the decision of the learned Deputy Registrar cannot proceed with Mr. Ernest Chua representing him. To give the opportunity to the 1st plaintiff to take the necessary step, this appeal is stood adjourned to a date to be fixed, as soon as possible, by the learned Senior Assistant Registrar. Costs thrown away to the defendant in any event.